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No. 91-826

In the
Supreme Court of the United States
October Term, 1991

MARY SCHULDT and DOUGLAS SCHULDT
on behalf of themselves and their minor daughter,
ERIKA SCHULDT,

Petitioners,

v.

MANKATO INDEPENDENT SCHOOL DISTRICT NO. 77,

Respondent.

BRIEF IN OPPOSITION TO A PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below neither required Petitioners to re-exhaust their administrative remedies nor adopted a standard of law in conflict with decisions of this court or any other circuit court.

2. Whether the court's decision below did not create a conflict with decisions of this court or other circuit courts regarding the effect of procedural errors upon provision of a free appropriate public education.

3. Whether the court below did not adopt a cost-benefit analysis thus its decision did not conflict with decisions of other circuit courts or administrative agencies.

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STATEMENT OF THE CASE

Minnesota's Commissioner of Education, reviewing the decision of the hearing officer following the local hearing, concluded that the school district did not fully follow procedural requirements of state and federal law when it proposed and implemented a kindergarten program of education for Erika Schuldt which was put in place as of September 9, 1988. (Pet. App. E-37, et. seq.) Specifically, special education planning team meetings held during the spring and summer of 1988 were not attended by all persons whose attendance was required, written correspondence to the parents was not accompanied by required enclosures reciting parental rights and the individualized educational plan (IEP) meeting was not held until October 25, 1988. None the less, the Commissioner found specifically that the

1988-89 kindergarten program at Kennedy Elementary School did not deny Erika access to specialized instruction and related services, which were individually designed to provide her with educational benefit, and did not deny her right to placement in the least restrictive environment. The Commissioner further held that the school district was not required to make structural modifications to Roosevelt Elementary School in order to make it accessible to Erika because there was an accessible school in the district (Kennedy Elementary School, close to Erika's home which she was then attending). (Pet. App. E-55-57)

The district court affirmed the Commissioner's decision, holding that, notwithstanding the procedural errors, "...the District is providing Erika with a free appropriate public education. Erika is being educated with

non-handicapped students for most of the school day at a school close to her home. She is apparently making satisfactory educational progress." (Pet. App. D-22)

The parents did not contest these facts before the district court, rather they asserted that a placement which was not at the elementary school closest to their home (Roosevelt Elementary School) violated the least restrictive environment requirements of the Education for All Handicapped Children Act of 1975 (20 U.S.C. § 1401 et. seq., at § 1412(B), the "Act"). (Pet. App. D-16) They argued that the Act and its regulations create mandatory standards regarding least restrictive environment which the school district violated when it failed to prove that Erika's IEP required a placement at Kennedy Elementary School.

The parents further sought to create a nexus between the least restrictive

environment requirements and the procedural errors the hearing officer and the Commissioner found by arguing that if the district had followed the procedural requirements, Erika's educational program would have been placed at Roosevelt Elementary School. They requested that the district court direct the school district to place Erika at Roosevelt without any further proceedings. (Pet. App. D-21) That is, petitioners specifically "...waived their possible right to a remand based upon the District's failure to follow the Act's procedural safeguards." (Pet. App. D-15)

The district court rejected the parents' construction of the Act's least restrictive environment requirements, concluding:

> The Act and section 300.552 do not create an absolute duty to place a child in the school closest to her home. Rather, these provisions list factors the school district should

> consider and require only that a student be placed in the school closest to her home that can meet her individual needs. A student's desire to attend another school is not dispositive.

(Pet. App. D-19, 20). It then concluded that the decision that Erika should attend an accessible school other than her neighborhood school would have been the same whether all applicable procedures were followed or not. (Pet. App. D-22)

The district court considered the parents' actual participation in the discussions which led to Erika's placement, the placement's success, the fact that the parents waived any possibility of remand to develope a new IEP and its own conclusion that the school district's decision to place Erika at a school other than her neighborhood school was unaffected by any procedural errors. (Pet. App. D-22) It then

concluded that "[d]irecting the District to place Erika at Roosevelt would be inappropriate under these circumstances":

> Without remanding for the development of a new IEP, an order directing Erika's placement at Roosevelt would violate Rowley's admonition against a court imposing its views of preferable educational methods upon the state.

(Pet. App. D-23, citing Board of Education v. Rowley, 458 U.S. 176, 207 (1982)) In other words "[i]n spite of these procedural defects, the court denied relief because it found that the school district is providing Erika with a free appropriate public education in the least restrictive environment available, thereby complying with the ultimate purpose of the Education for the Handicapped Act." (Pet. App. A-2) "The issue, according to the district court, was not whether the school district followed the procedural requirements, but

whether what it actually did satisfied the requirements of the Education for the Handicapped Act." (Pet. App. A-7)

Before the United States Court of Appeals for the Eighth Circuit, Petitioners argued that the district court erred in refusing to direct the school district to place Erika at Roosevelt Elementary School and in suggesting that the only remedy for the procedural errors would have been to remand for further proceedings. They asserted that, in effect, the district court required them to "re-exhaust" administrative remedies.

The court of appeals, however, agreed with the district court's reasoning and conclusions. "[T]he failure of the school district to comply with procedural requirements, of necessity, would require remand for further consideration." (Pet. App. A-9) It found, moreover, that the

district court "properly reasoned" that without remand an order directing Erika's placement at Roosevelt would violate Rowley's admonition against a court imposing its views of preferable educational methods upon the state (Pet. App. A-10) and that remand was unnecessary because the School District was providing Erika with a free appropriate public education in the least restrictive environment, thereby complying with the Act's objectives. Petitioners, further, had waived the possibility of remand.

ARGUMENT

This case arises under the Education for All Handicapped Children Act, 20 U.S.C. § 1401, et seq. Petitioners have sought, at all levels, Erika's placement at Roosevelt Elementary School, the school she would attend if she was not

handicapped. They argue that the School District violated Erika's right to a free appropriate public education under the Act when it committed certain procedural errors during the process which resulted in her kindergarten placement at Kennedy Elementary School, an accessible school close to her home, for the 1988-89 school year. The District Court and the Court of Appeals found that despite procedural errors Erika had been given a free appropriate public education and declined, therefore, to place her at Roosevelt Elementary School. (Petitioners waived any right to a remand in order to correct procedural errors.)

Petitioners now assert that the decision of the Court of Appeals for the Eighth Circuit conflicts with decisions of this Court and other courts of appeals. As the decision of the Court of Appeals does not create conflict with

this Court or among the circuits, Petitioners are really seeking only another level of review in hopes of achieving a placement at Roosevelt Elementary School. As this does not rise to the level of "special and important" reasons under Supreme Court Rule 10.1, the Petition should be denied.

I. THE COURT BELOW NEITHER REQUIRED PETITIONERS TO RE-EXHAUST THEIR ADMINISTRATIVE REMEDIES NOR ADOPTED A STANDARD OF LAW IN CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT COURT.

Petitioners' assertion of a conflicting standard of law among the circuits is based upon an erroneous reading of the cases which they offer in support of this contention and an inaccurate analysis of the facts below.

A. The District Court had the Power to Remand for the Correction of Procedural Errors, but for Petitioners' Waiver.

Petitioners assert that the decision

below conflicts with decisions of other circuits which, they claim, stand for the proposition "...that once a dispute of this nature reaches a District Court, it should be resolved there." (Petition-16) Petitioners reason that as the district court had authority to grant relief, but declined to grant the specific relief they requested, it did not resolve the dispute. This reasoning ignores the fact that once this dispute reached the District Court it was "resolved there." The court concluded that, notwithstanding any procedural errors, Erika had been provided a free appropriate public education in the least restrictive environment.

Petitioners, moreover, appear to base their argument upon the possibility that the district court might have, but for their waiver, remanded the case to the state reviewing officer or the due

process hearing officer for the purpose of correcting procedural errors. Petitioners cannot base an appeal upon action which a court might have taken had Petitioners not waived their rights.[1]

Petitioner's assertion that the district court lacked the discretion to remand the case in order to correct procedural errors is meritless.

In support of their proposition petitioners cite Muth v. Central Bucks School District, 839 F.2d 113 (3d Cir. 1988). The question before the Court of Appeals for the Third Circuit in Muth was not the propriety of an order of remand by a district court. Rather, it was whether the "impartial review"

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[1]The right of parents represented by counsel to waive procedural rights and protections granted by the EHA was recognized by the Sixth Circuit in the case of Cordrey v. Euckert, 917 F.2d 1460 at 1465 (6th Cir. 1990).

provisions of 34 CFR § 300.512 impose timelines upon state educational or other administrative reviewing agencies for reaching final decisions which, as a practical matter, preclude remand to the local due process hearing officer. Muth, 839 F.2d at 125. The court did not even comment upon the power of federal courts reviewing such decisions to remand the proceedings before them to administrative bodies, including the state educational reviewing agency or the due process hearing officer, for further action.

Petitioners make no reference to any provision of law or to any regulation which imposes a similar limitation upon the alternatives available to a district court reviewing the decision of the state educational or other reviewing agency.

In short, Muth addresses neither the power of a district court to remand a case before it under the EHA nor, and

what is more to the point in these proceedings, the effect of a waiver of the right of remand for the purpose of correcting procedural errors.

At least one circuit court decision has, however, specifically held that district courts have the authority to remand such proceedings to the hearing officer for the correction of procedural errors. Doe v. Smith, 879 F.2d 1340 at 1344 (6th Cir. 1989).

B. The Court of Appeals did not Require Petitioners to Re-exhaust Their Administrative Remedies.

Petitioners argue that the failure of the court of appeals to agree with their interpretation of the Act's least restrictive environment requirements (20 U.S.C. § 1412(B), 34 C.F.R. § 300.550-56) and to order an educational placement at Roosevelt Elementary School constituted error because it caused them either to

have to re-exhaust their administrative remedies or to be exposed to the likelihood of having to do so. In support of this argument Petitioners cite DeVries v. Spillane, 853 F.2d 264 (4th Cir. 1988), which arose out of a parent's assertion that a proposed IEP was inappropriate because it did not provide for attendance at the neighborhood school. When the appeal from the decisions of the local due process hearing officer and the state reviewing officer came before the district court, the parent directed her arguments only to a subsequent IEP which had not yet been the subject of administrative hearings. Even though the basis for objection to the subsequent IEP was the same as it was for the IEP which had been subject to administrative review, the district court declined to hear the matter and dismissed

the suit. DeVries v. Fairfax County School Board, 674 F.Supp. 1219 (E.D. Va. 1987). In DeVries the Fourth Circuit held, as Petitioners point out, (Petition-16, 17) that as the parent's objection to the two IEP's was identical, the issue had in fact been considered by the administrative tribunal. Thus, re-exhaustion by requiring the parent to challenge the subsequent IEP through the administrative process was unnecessary and inconsistent with the Act. DeVries, 853 F.2d 264 at 267

The case below does not give rise to the application of the doctrine of re-exhaustion of remedies, however. The IEP for the 1988-89 kindergarten program was the only IEP which Petitioners challenged at any level of these proceedings. Unlike the situation which existed in DeVries, the issue of the appropriateness of that IEP has been

fully litigated on the basis of the only IEP which was contested and the complete record of proceedings brought before the district court and the court of appeals. It will not be necessary for Petitioners to challenge a subsequent IEP in order to determine Erika's right to attend the school which she would otherwise attend if she were not handicapped. Nor have Petitioners attempted to do so. In the proceedings below the district court and the court of appeals promulgated a standard which fully resolved all of the questions Petitioners brought before these courts.

C. The Decision of the Court of Appeals Complies with the Act's Judicial Review Provision.

Finally, Petitioners argue that the decision of the court of appeals below conflicts with the Act's judicial review provision, the pertinent portion of which (20 USC § 1415(e)(2)) is as follows:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines to be appropriate.

20 U.S.C. § 1415(e)(2) (emphasis supplied). Petitioners have made no claim that the district court did not receive or base its decision upon all of the records of the administrative proceedings. Neither have they claimed that any party to the proceedings before the district court made a request that the court hear additional evidence. Thus, Petitioners' assertion that the Act's judicial review provision was violated comes down to the fact that the court of appeals did not find, despite Petitioners' waiver of the possibility of remand, that the procedural errors precluded a conclusion that a free

appropriate public education had been offered. As discussed above, the decision fully resolved the issue before the court. The failure of Petitioners to agree with the outcome does not change the fact that the court granted the relief it found to be appropriate. Essentially, Petitioners merely restate their "harmless error standard" argument which is discussed below. There is no basis for any conclusion that the decision of the court of appeals, below, has or will require Petitioners to re-exhaust any administrative remedy.

II. THE COURT'S DECISION BELOW DID NOT CREATE A CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS REGARDING THE EFFECT OF PROCEDURAL ERRORS UPON PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION.

A. Petitioners Waived Consideration of the Effect of any Procedural Errors.

At the time of oral argument before the district court, the district court

assumed for purposes of its deliberations that certain technical procedural violations had taken place. The court emphasized that the practical significance of such errors was of special interest to the court. (Resp. App. A-iv) The court then directed the parents to address the consequence of any procedural violations and asked whether they desired the court to remand for further steps with perfect procedural mechanisms to be taken. The parents stated, however, that they had no interest in remand. They wanted the court to order directly their desired result--modification of Roosevelt Elementary School and Erika's attendance there. (Resp. App. A. iv-vi).

Petitioners do not now assert that they lacked the power to waive enforcement of a right specifically

granted parents by the EHA. (See footnote 1 at p. 12, above).

Directly as the result of this waiver the district court found that it was "... unnecessary to reach this issue." (Pet. App. D-14) The court of appeals agreed that the district court properly "... declined to consider the impact those procedural violations had on Erika because the Schuldts had 'waived their possible right of a remand' during oral argument before the district court." (Pet. App. A-8, 9)

Even if the procedural errors had been grievous in magnitude and effect and even if the circuits had adopted a rule holding that the occurrence of any procedural error precludes the offering of a free appropriate public education, the fact would remain that Petitioners waived consideration of such defects. Petitioners cannot now be heard to

complain that their waiver should not have been accepted or respected. Nor would any such argument of error raise to the level of the "special and important reasons" which are required in order to justify the assertion of jurisdiction by this court (Sup. Ct. R. 10.1). Petitioners assert no law whatsoever in support of such a proposition.

B. Petitioners Cannot Establish a Conflict Among the Circuit Courts with Regard to Harmless Error.

Petitioners assert that the decision of the court of appeals, below, applies a harmless error standard which conflicts with the standards adopted by other circuits. While Petitioners never articulate this standard, they appear to assert that the Fourth and Fifth Circuits have adopted as a rule the proposition that any violation of rights of procedural due process must result in a

finding that a free appropriate public education has been denied. The cases Petitioners cite do not support their argument.

It cannot be denied that under certain specific and limited circumstances (see discussion below) the federal courts have found that the failure to comply with the Act's procedural requirements has resulted in the denial of a free and appropriate public education. Petitioners, however, make no attempt to analyze the circumstances in which the courts have reached such a conclusion. Had Petitioners made such an analysis they might have noted, as did the Court of Appeals for the District of Columbia in Anderson v. District of Columbia, 877 F.2d 1018 at 1021 (D.C. Cir. 1989) that the procedural errors discussed in Fourth Circuit cases holding that the occurrence

of procedural errors caused the denial of a free appropriate public education "...were ones that the court may have viewed as inherently carrying a very high probability of prejudice."

In Hall v. Vance, 774 F.2d 629 (4th Cir. 1985) a school district not only egregiously violated the procedural requirements of the Act but, additionally and significantly, failed to provide a substantively appropriate IEP or an education reasonably calculated to enable the plaintiff to receive educational benefit. Id. at 634, 635. The Court of Appeals for the Fourth Circuit found that under these factual circumstances the failure to meet the procedural requirements of the Act was an adequate basis upon which to base a finding of a denial of a free appropriate public education. The court did not, however,

hold that any or every procedural defect must result in a similar conclusion.

In Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) the court specifically based its finding that a parent was entitled to receive tuition reimbursement on the school district's failure to offer a program of education which took into account or demonstrated a need for learning disabilities education. While a question of procedural compliance was raised on appeal, the court of appeals expressly found that the school district had complied with the "elaborate" procedural requirements of the Act. The court, rather significantly, then elaborated upon the standard which it had established in Hall:

> Such compliance is critical to the efficient operation of the Act, and serious procedural noncompliance can by itself support a finding that the child has not been provided with a (Free appropriate public education).

Hudson, 828 F.2d at 1063, citing Hall, 774 F.2d 629. Hudson stands for the proposition that in the Fourth Circuit procedural noncompliance must be shown to be serious to support a conclusion that it has caused the denial of a free appropriate public education. In other words, the Fourth Circuit has recognized that not all errors will result in such a conclusion. This appears to be what Petitioners would call a harmless error standard.

In 1978 the Fourth Circuit addressed this issue in Board of Education of the County of Cabell v. Dienelt, 843 F.2d 813 (4th Cir. 1988). This case also involved findings that a school district had committed "grievous procedural defects" while failing to provide a substantively appropriate IEP.

In 1990 the Fourth Circuit again addressed the same issue in Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990). Here parents claimed reimbursement from a school district for several areas of service which they had obtained from private sources. With regard to a claim for the costs of hospitalization this case expressly follows the Hall, Dienelt and Hudson line of decisions: There was a grievous denial of due process in addition to the lack of a substantively appropriate IEP. Tice, 908 F.2d at 1026, 1027.

With regard to a claim for reimbursement for psychotherapy services, however, the court commented:

> ...unlike the situations in Hall and Dienelt, and unlike appellants' claim for expenses incurred during the hospitalization when no IEP was in place, these procedural violations had no impact on whether Matthew's IEP

> adequately assured him of a FAPE.... Accordingly, in order for appellants to prevail on the claim for expenses incurred after this date, they must prevail on the second, more difficult prong of the Rowley inquiry. They must prove that Matthew's IEP, absent psychiatric counseling, was not reasonably calculated to enable him to receive educational benefits.

Tice, 980 F.2d at 1208 (emphasis supplied). Tice stands squarely for the proposition that the Fourth Circuit rule of Hall v. Vance and its progeny is that failure to meet the Act's procedural requirements can be adequate grounds by itself for holding that a school district has failed to provide a free appropriate public education if the severity of the procedural errors is sufficiently grievous. The corollary of this rule, as demonstrated by Hudson and Tice, is that procedural violations which have no impact or a minimal impact on a program of education do not deny a free

appropriate public education. Again, this would appear to be what Petitioners would call a harmless error standard.[2]

Petitioners also discuss the Fourth Circuit's decision in Spielberg v. Henrico, 853 F.2d 256 (4th Cir. 1988) This decision, which preceded Tice by almost two years, is not in any manner or degree inconsistent with the rule of its successor. To the contrary, it is altogether consistent with the holding in Tice: egregious procedural errors which have an adverse impact on the offering of a program of special education can be found to have resulted in the denial of a free appropriate public education.

Even if, solely for purposes of argument, it were to be conceded that the

[2]See also, Burke County Board of Education v. Denton, 895 F.2d 973 at 982 (4th Cir. 1990) (minor procedural facts of a school board were insignificant since they did not cause the child to lose education opportunity.)

Eight Circuit adopted a harmless error standard, there is no conflict between any of the Fourth Circuit cases cited by Petitioners and the Eight Circuit's holding.

Petitioners cite Jackson v. Franklin County School Board, 806 F.2d 625 (5th Cir. 1986), apparently in support of a contention that the Court of Appeals for the Fifth Circuit has adopted a standard for reviewing procedural compliance which conflicts with the holding of the Eighth Circuit below. In this case, however, the Fifth Circuit merely adopts the Hall v. Vance line of cases. That the court recognizes the rule of these cases contemplates the occurrence of harmless error is established by its order. It remanded the matter for the district court to determine whether the procedural error (failure to provide notice and a hearing) had any effect upon the program

of education which the student received. Jackson, 806 F.2d at 631.

Petitioners also make reference to the standard of procedural review in the Sixth Circuit but provide no authority for their discussion. (Petition-23) In Thomas v. Cincinnati Board of Education, 918 F.2d 618 at 625 (6th Cir. 1990), however, the Sixth Circuit made it clear that it has adopted a harmless error standard:

> ...the only error was one of technical noncompliance which did not result in any substantive deprivation. Therefore, the violation cannot be said to amount to prejudicial error."

See also Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).

C. The Court's Decision Below Does Not Conflict With Rowley.

The leading decision defining the obligation of school districts to provide a free appropriate public education under

the Act is Board of Education v. Rowley, 458 U.S. 175 (1982). Rowley, without any question, recognizes the importance of compliance with the Act's procedural requirements. In fact, procedural compliance becomes the first of the two prongs of the test Rowley establishes for determining whether there has been compliance with the Act's requirements. Id. at 207.

But Rowley contains no language which is inconsistent with the holdings of the Fourth Circuit in Hall v. Vance or its progeny, including the harmless error standard specifically recognized in the Hudson and Tice decisions. In fact, a harbinger of a harmless error standard is found in the following language from Rowley:

> We think the congressional emphasis upon full participation of concerned parties throughout the development of the IEP... demonstrates the legislative

> conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

458 U.S. at 205 (emphasis added).

III. THE COURT BELOW DID NOT ADOPT A COST-BENEFIT ANALYSIS THUS ITS DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR ADMINISTRATIVE AGENCIES.

The decision of the Court of Appeals did not improperly apply a cost-benefit analysis and is consistent with applicable standards regarding least restrictive environment.

A. The Court of Appeals Did Not Improperly Utilize A Cost-Benefit Analysis.

Petitioners assert that the decision of the court of appeals, below, creates a conflict with the decisions of other circuits because the Court "used the wrong standard--that of a cost-benefit analysis." (Petition-27) Petitioners assert that such an analysis was the

principal basis for the decision of the court of appeals and that such principal reliance constituted error. (Petition-34) The argument seriously misstates the record.

It is true that the decision of the district court makes a brief reference (Pet. App. D-20) to the cost of making the neighborhood school accessible to Erika and the resulting benefit to the student as constituting a consideration which was relevant to the court. As the court of appeals pointed out, however:

> The record does not suggest that the court relied heavily on cost-benefit analysis for its ultimate decision. The court's brief reference to the balancing of cost and benefits only appears once, that reference is in the court's discussion of whether the Education for the Handicapped Act creates an absolute duty to place the child in the school nearest to that child's home.... (Pet. App. A-14, 15) The court was explaining that distance from a child's home is not the determining factor, but only one of several factors a

school district must consider when deciding whether a child's placement complies with the Act and its regulations.

The court of appeals in turn, makes reference to the concept of a cost-benefit analysis primarily for the purpose of setting the record straight by responding to Petitioners' tortured arguments: "the Schuldts take statements from McFarling's testimony out of context and place a strained interpretation on them." (Pet. App. A-15, 16)

B. The Circuts Have Recognized and Approved the Use of a Cost-Benefit Analysis as One Element in Determining Compliance with the Act.

Petitioners, in any event, misconstrue the use to which the courts of appeals have applied the concept of a cost-benefit analysis in determining compliance with the requirements of the Act. As the Eighth Circuit pointed out

in A.W. ex rel. A.W. v. Northwest R-1 School District, 813 F.2d 158, 163 (8th Cir. 1987) the concept of applying a cost-benefit analysis to mainstreaming benefits:

> It consistent with the Supreme Court's conclusion in Rowley that the Act does not require states to provide each handicapped child with the best possible education at public expense, 458 U.S. at 188-189, 102 S.Ct. at 3041-42, and the Court's recognition that available financial resources must be equitably distributed among all handicapped children.

Thus, in Roncker v. Wolter, 700 F.2d 1058 at 1063 (6th Cir. 1983), cert. denied, 464 U.S. 864, the Sixth Circuit observed: "cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children."

Roncker expressly applied the concept of a cost-benefit analysis to the determination of the least restrictive

environment, and even more to the point, the determination of the location of the program of education. N.W. v. A-1 also applies the concept to the determination of the least restrictive environment, again, in the context of the determination of the location of a program of education.

Most recently the Fourth Circuit in the case of Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991) commented:

> Although we agree with Plaintiffs that the Board should not make placement decisions on the basis of financial considerations alone, 'appropriate' does not mean the best possible education that a school district could provide if given access to unlimited funds (citing Rowley, 458 U.S. at 199)...Because the Act requires the state to establish "priorities for providing a free appropriate public education to all handicapped children," we find that Congress intended the states to balance the competing interest of economic necessity, on the one hand, and the special needs

> of a handicapped child, on the other, when making education placement decisions.... Consequently, in reviewing the defendant's placement decision, the district court correctly considered the factors and properly found that the program offered at Annandale was appropriate.

Id. at 154.

It is consistent with the Act to consider cost as one of several factors that a school district must consider when deciding whether a child's placement complies with the Act and its regulations. Petitioners' argument wholly ignores the context in which reference to a cost-benefit analysis was made. Petitioners attempt to portray the decision of the Court of Appeals as being a "simple cost-benefit analysis." (Petition-28) Such a statement seriously mischaracterizes the record.

C. The Decision of the Court of Appeals With Regard to the Location of the Program of Education Complied with the Requirements of the EHA.

The Petitioner's argument attempts to characterize decisions regarding the location of the program of a physically impaired handicapped child as being somehow subject to a different standard than that applicable to other disabilities. The Sixth Circuit in Roncker, Eighth Circuit in A.W. v. Northwest R-1 and Fourth Circuit in Barnett recognize no such distinction. Rather, the nature of a child's disability is one of the factors to be considered in determining compliance with the Act and with the requirement of 34 C.F.R. § 300.552 that unless the "child's (IEP) requires some other arrangement," that the placement be made "in the school (the child) would have attended if not handicapped." But, as the Fourth Circuit noted in Barnett, 927 F.2d 146 at 153 this section has not been interpreted "... as imposing upon a school board an

absolute obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions."

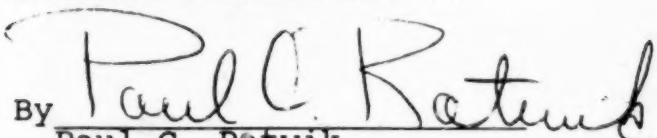
The record below is replete with evidence that the Court of Appeals for the Eighth Circuit complied with this standard.

CONCLUSION

The Court of Appeals' decision below does not conflict in any regard or to any degree with any decision of the circuits or of the Supreme Court. Petitioners have failed to establish any of the "special and important reasons" for the exercise of review pursuant to writ of certiorari Supreme Court Rules 10.1. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MANKATO INDEPENDENT
SCHOOL DISTRICT NO. 77

By 

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Mary Schuldt, Douglas Schuldt, on behalf of themselves and their minor daughter, Erika Schuldt, Plaintiffs, -vs- Mankato Independent School District No. 77; and Ruth Randall, in her capacity as Commissioner of the Minnesota Department of Education, Defendants.	4-89 Civil 636
	Minneapolis, Minnesota December 1, 1989 9:15 o'clock a.m.

MOTIONS BEFORE THE COURT

BEFORE THE HONORABLE DIANA E. MURPHY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Kristin A. Siegesmund
Laurie Davison

For Mankato ISD: Paul C. Ratwik
Susan E. Torgerson

For the Department of Education: Laura E. Mattson

PROCEEDINGS

THE CLERK: Your Honor, the next matter on the calendar is Schuldt versus Mankato Independent School District No. 77 and Ruth Randall. Counsel, please come forward and identify yourselves for the record.

THE COURT: Who's appearing on behalf of the plaintiffs?

MS. SIEGESMUND: I am, Your Honor, Kristin Siegesmund. With me is Laurie Davison.

THE COURT: And for Mankato School District?

MS. TORGERSON: Your Honor, I'm Susan E. Torgerson, appearing on behalf of the School District with co-counsel Paul Ratwik.

MS. MATTSON: My name is Laura Mattson. I'm representing Commissioner Ruth Randall.

THE COURT: Okay. This is a case in which there has been extremely voluminous materials submitted. And the Court is in trial in a criminal case that's scheduled to start again at 10:00 o'clock.

We don't have time for counsel to go over the factual background or to try to discuss all of the issues that are raised in your briefs. The reason that we let you file longer briefs than normal was so that you could go over all of this in the briefs.

So this morning I'd like you to focus your arguments on just the key issues, because there is limited time. And one of the things that occurred to the Court in going over this is, it appears that there were procedural violations. It appears that everybody agrees that not all of the procedural steps or technical things were complied with.

But I'd like you to address the practical significance of that. It doesn't seem that anybody is asking for the case to be remanded for further steps with perfect procedural mechanisms to be taken at that time.

Maybe I'm wrong. Maybe plaintiffs would like it to be remanded to have complete compliance. And so if that's what you're seeking, I'd like to know that.

But I don't want to have a big discussion about these procedural violations here, because it's not clear that there's much consequence at this point. If I'm wrong, you can address that.

And the question of whether it was a proper person that conducted the review, you seem to have briefed that very extensively. Unless you've got some new

authority that you want to cite on that, I don't want you to repeat the arguments that were made in the briefs on that.

Obviously, the key point here is the extent of the obligation to provide an appropriate education in the least restrictive environment. And that that means as far as which school should be required here is the substantive key.

So with that, I turn it over, then, to plaintiff first.

* * *

THE COURT: I don't understand you to be asking, though, for the matter to be sent back for them to start anew.

MS. SIEGESMUND: That's exactly right. And the reason is because there's not going to be any difference in the decision.

The team recommended that the child go to Roosevelt and the only reason she

didn't go there was because they didn't want to make it accessible. And to send it back now is, first of all, a waste of time.

We've already waited a year and a half for this to move through the procedural processes. This kid is already in first grade now. It's going to take time to make the building accessible.